

1 STEVEN G. KALAR
2 Federal Public Defender
3 GRAHAM ARCHER
4 Assistant Federal Public Defender
5 55 S. Market Street, Suite 820
6 San Jose, CA 95113
7 Telephone: (408) 291-7753
8 Graham_Archer@fd.org

9
10 Counsel for Defendant, DOUGLAS STORMS YORK

11
12 IN THE UNITED STATES DISTRICT COURT
13
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15
16 SAN JOSE DIVISION

17
18 UNITED STATES OF AMERICA,) No. CR 15-00226 EJD
19 Plaintiff,)
20 vs.) DEFENDANT YORK'S MEMORANDUM
21) OF POINTS AND AUTHORITIES
22) REGARDING COUNT ONE (18 U.S.C. §
23) 912) JURY INSTRUCTION
24)
25 DOUGLAS STORMS YORK,)
26 Defendant.)

Honorable Edward J. Davila

17 **INTRODUCTION**

18 Defendant Douglas Storms York, by and through Assistant Federal Public Defender Graham
19 Archer, submits this Memorandum of Points and Authorities in support of an alternate jury
20 instruction to the Ninth Circuit Model Instruction for Count one, an alleged violation of 18 U.S.C.
21 § 912.

22 The Ninth Circuit Model Instruction provides no explanation or direction to the jury that
23 there is a mental state required to commit the offense. Additionally, the model instruction fails to
24 explain that the “acting as such” element requires proof that the act induced the targeted individual
25 to follow some course of conduct, as required by *United States v. Lepowitch*, 318 U.S. 702, 704
26

(1943). Accordingly the Court should give the defense's proposed instruction regarding count one, as set forth below.

ARGUMENT

4 As noted in the Model Instructions themselves, “[t]he instructions in this Manual are models.
5 They are not mandatory, and must be reviewed carefully before use in a particular case. They are
6 not a substitute for the individual research and drafting that may be required in an individual case.”
7 Ninth Circuit Model Criminal Jury Instructions, Introduction to 2010 Edition. If the jury is not
8 instructed on an essential element, the prosecution is relieved of its duty to prove every element
9 beyond a reasonable doubt, depriving the jury of its fact-finding duty, and resulting in constitutional
10 error. *Carella v. California*, 491 U.S. 263, 265 (1989).

In the instant case, where the allegation is based on an approximately thirty-second voicemail, the potential for jury confusion is significant as to the necessary mens rea of an intent to deceive and the potential that it will be construed by the jury in an impermissibly overbroad manner. Further, the “acting as such” element requires an essential inducement to a course of conduct.¹ The Ninth Circuit’s model instruction fails to adequately address these issues.

16 I. The Requirement of an Intent to Deceive Is An Element of Section 912 Based on Lepowitch

18 In *Lepowitch*, the United States Supreme Court held that the “acting as such” prong
19 under 18 U.S.C. § 76 (later renumbered as section 912) required that the defendant, by artifice
20 and deceit, “sought to cause the deceived person to follow some course he would not have

²² ¹ The defense has requested a further instruction as to the requirement of an additional act
23 for the “acting as such” element based on *United States v. Larson*, 125 F.Supp 360 (D.C. Alaska
24 1954) (holding that an indictment which charged that the defendant impersonated a United States
25 officer and falsely took upon himself to act as such, “in that he falsely stated to (a named person)
26 that he was a special agent of the Federal Bureau of Investigation engaged in the investigation of
a criminal violation” did not state an offense)(citations omitted). Additionally, the defense has
requested a further instruction on materiality. See Docket No. 67.

1 pursued but for the deceitful conduct.” *Lepowitch*, 319 U.S. at 704. The *Lepowitch* court
 2 distinguished this element from the second offense (not charged in Mr. York’s case) found in
 3 section 76, a deceitful attempt to obtain a thing of value. *Id.* at 704-705.

4 In 1948, Section 76 was renumbered to Section 912, and the language of Section 76
 5 requiring “intent to defraud” was removed. *See United States v. Randolph*, 460 F.2d 367 (2nd
 6 Cir. 1972). The removal was solely intended to delete redundant language, and not to delete the
 7 intent requirement identified by the Supreme Court. 18 U.S.C.A. § 912, Historical and Statutory
 8 Notes (“The words ‘with the intent to defraud the United States or any person’, contained in said
 9 § 76 of Title 18, U.S.C., 1940 ed., were omitted as meaningless in view of *United States v.*
 10 *Lapowich* [sic], 63 S.Ct. 914.”). The Ninth Circuit addressed this issue in *United States v.*
 11 *Tomsha-Miguel*, 766 F.3d 1041 (9th Cir. 2014). Although the court held that the government
 12 was not required to plead a specific instance of fraud in the indictment, it acknowledged (citing
 13 *Lepowitch*), that “[b]ecause § 912’s statutory elements incorporate an intent to deceive, the
 14 statute reaches only those acts that are intentionally deceptive.” *Id.* at 1049.

15 **A. This Court Must Give An Instruction That Comports With *Lepowitch***

16 In the Eighth Circuit, the model jury instruction for § 912 reads as follows:

17 The crime of impersonation of a federal [officer] [employee], as charged in [Count __ of]
 18 the Indictment, has three elements, which are:

19 *One*, the defendant pretended to be (describe the pretense, e.g., a special agent of the
 20 F.B.I.); and

21 *Two*, such pretense was false and the defendant knew it was false; and

22 *Three*, the defendant, while so pretending, [acted with the intent to cause a person to
 23 follow some course of action or inaction] [[demanded] [obtained] some [money] [paper]
 24 [document] [thing of value]].

25 Eighth Circuit Model Jury Instruction, No. 6.18.912. *See Exhibit A. See also United States v.*
 26 *Gilbert*, 143 F.3d 397 (8th Cir. 1998) (“This Court has held that “to ‘act as such’ would be the
 equivalent of causing ‘the deceived person to follow some course he would not have pursued but

1 for the deceitful conduct.”” *United States v. Robbins*, 613 F.2d 688, 691 (8th Cir.1979) (quoting
 2 *United States v. Lepowitch*, 318 U.S. 702, 704, 63 S.Ct. 914, 916, 87 L.Ed. 1091 (1943)).”

3 This proposed instruction is thus warranted under *Lepowitch* and is consistent
 4 with *Tomsha-Miguel*. In *Tomsha-Miguel*, the Ninth Circuit stated that in light of vagueness and
 5 overbreadth concerns, the statute must be narrowly construed to apply only to intentionally
 6 deceptive acts:

7 Because § 912’s statutory elements incorporate an intent to deceive, the statute reaches
 8 only those acts that are intentionally deceptive. See *Lepowitch*, 318 U.S. at 704, 63 S.Ct.
 9 914 (holding that the elements of § 912 implicitly incorporate an intent to defraud). We
 10 held similarly in *Perelman*, when we noted that § 912 was an example of a statute
 11 encompassing “a narrow range of conduct” limited to “intentionally deceptive acts.” 695
 12 F.3d at 871.

10

11 *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1049 (9th Cir. 2014). Any broader application
 12 of the statute by the jury would result in an impermissibly vague reading, would violate the
 13 notice requirement of the Due Process Clause, and would impinge upon First Amendment
 14 protections.

15

15 Similarly, in the Eleventh Circuit, the pattern instruction reads as follows:

16 It is a Federal crime to falsely impersonate an officer of the United States.

17

17 The Defendant can be found guilty of this crime only if all the following facts are proved
 18 beyond a reasonable doubt:

19

- (1) the Defendant pretended to be an officer or employee acting under the authority
 of the United States;
- (2) the Defendant acted as such;
- (3) the Defendant did so knowingly with intent to deceive or defraud another.

20

22 For purposes of this crime, to act “with intent to deceive or defraud” means to act with
 23 the specific intent to get a person to do something he would not otherwise have done.

24

24 Eleventh Circuit, Model Jury Instruction No. 33. See Exhibit B.

25

25 Both of these instructions accurately explain the burden of the government to prove

26

1 deceit, though the Eleventh Circuit's instruction includes "defraud," which is not necessary in
 2 *Tomsha-Miguel*.

3 The defense proposes that the Court give the following instruction, a combination of the
 4 Eighth and Eleventh Circuits' instructions that comports with the section 912, *Lepowitch*, and
 5 *Tomsha-Miguel*:

6 It is a Federal crime to falsely impersonate an officer of the United States.

7 The Defendant can be found guilty of this crime only if all of the following facts are
 8 proved beyond a reasonable doubt:

- 9 (1) the Defendant pretended to be an officer or employee acting under the authority
 of the United States;
- 10 (2) the Defendant acted as such;²
- 11 (3) the Defendant did so knowingly with intent to deceive another.

12 For purposes of this offense, to act "with intent to deceive" means that the defendant,
 13 while so pretending, acted with the intent to cause a person to follow some course of action or
 14 inaction.

CONCLUSION

16 Because an element of deceit is still required under Section 912, the Ninth Circuit Model
 17 instruction is insufficient. The Ninth Circuit's instruction allows the jury to convict Mr. York
 18 without proof beyond a reasonable doubt of all the elements under § 912. Accordingly, the
 19 Court should give the defense's proposed instruction.

20 Dated: August 27, 2015

Respectfully submitted,

21 STEVEN G. KALAR
 22 Federal Public Defender

23 _____
 24 s/
 GRAHAM ARCHER
 25 Assistant Federal Public Defender

26 ² See Docket No. 67 at 3.